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No. 92-38

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

CHRYSLER CORPORATION,

Petitioner,

v.

INTERNATIONAL UNION, ALLIED INDUSTRIAL WORKERS OF AMERICA, AFL-CIO, AND LOCAL 793 THEREOF,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE and BRIEF AMICUS CURIAE OF THE FLORIDA ASSOCIATION FOR WOMEN LAWYERS, NOW LEGAL DEFENSE AND EDUCATION FUND, CENTER FOR WOMEN POLICY STUDIES, AND CENTER FOR CONSTITUTIONAL RIGHTS IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

Pursuant to rule 37.2 of the Rules of this Court, the Florida Association for Women Lawyers, NOW Legal Defense and Education Fund, Center for Women Policy Studies, and Center for Constitutional Rights respectfully move for leave to file the attached brief amicus curiae. Counsel for petitioner has granted consent to file, and the letter expressing said consent is on file with the Clerk of this Court. Counsel for respondents has refused consent to file.

Florida Association for Women Lawyers ("FAWL") is a bar association formed in 1951. Its objectives are to pro-

mote women's rights and the common interests of women lawyers, to advance the science of jurisprudence, to promote reform in the law, to facilitate the administration of justice, and to uphold the highest standard of integrity, learning, honor and courtesy in the legal profession.

FAWL and its local chapters focus upon the professional advancement of women lawyers and the promotion of women's rights generally. FAWL was instrumental in convincing the Florida Supreme Court to appoint a Gender Bias Study Commission to determine in what areas of our legal society bias based on gender exists. The result of two years of hearings and study was a report concluding that "although some may ignore its existence, gender bias permeates Florida's legal system today."

FAWL's members have a strong interest in stopping sexual harassment. Sexual harassment is one of the most widespread problems faced by women in the work force. Its detrimental effect upon the mental and physical health of women workers, as well as their ability to advance in their chosen careers, has been well-documented.

NOW Legal Defense and Education Fund ("NOW LDEF") is a leading national non-profit civil rights organization that performs a broad range of legal and educational services in support of women's efforts to eliminate sex-based discrimination and secure equal rights. NOW LDEF was founded in 1970 by leaders of the National Organization for Women. Eliminating sexual harassment in the workplace is a major focus of NOW LDEF's efforts. NOW LDEF attorneys have presented testimony concerning sexual harassment before the Subcommittee on Employment Opportunities of the House Committee on Education and Labor, U.S. Congress, litigated several sexual harassment cases, including *Robinson v. Jacksonville Shipyards, Inc.*, 760 F.Supp. 1486 (M.D. Fla. 1991),

appeal docketed (11th Cir. July 3, 1991), and coordinated all the amicus briefs filed in *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986). NOW LDEF also drafted an amicus brief on behalf of the employer in *Newsday, Inc. v. Long Island Typographical Union*, 915 F.2d 840 (2d Cir. 1990), *cert. denied*, 111 S.Ct. 1314 (1992), on the same issues presented by this case.

The Center for Women Policy Studies was founded in 1972 as the first national policy research and advocacy institute focused exclusively on issues of social and economic justice for women. The Center has published materials on sexual harassment and violence against women. Our current work focuses on defining violence against women (like acts of violence based on race, ethnicity, national origin, religion, and sexual identity) as not random, isolated crimes against persons who happen to be female. Rather these crimes against individuals are meant to intimidate and terrorize the larger group or class of people—women.

The Center for Constitutional Rights ("CCR") is a litigation/education organization located in New York and Mississippi which was founded in 1966. Born of the civil rights movement and the struggles of Black people in the United States for true equality, CCR has litigated for voting rights, civil rights, and rights protected by international law.

CCR is of the view that the decision of the Seventh Circuit affirming the decision of the arbitrator to reinstate an employee who has repeatedly engaged in sexual harassment must be reversed. The Seventh Circuit decision is in conflict with similar cases decided by other circuits and violates the well-defined public policy against sexual harassment at the workplace.

The attached brief amicus curiae addresses the public policy issues raised by the court of appeals' ruling and its impact on the victims of sexual harassment.

Respectfully submitted.

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INTEREST OF THE AMICI CURIAE

Florida Association for Women Lawyers ("FAWL") is a bar association with over 2,000 members whose objectives include the promotion of women's rights. FAWL was instrumental in convincing the Florida Supreme Court to appoint a Gender Bias Study Commission to determine in what areas of our legal society bias based on gender exists. The result of two years of hearings and study was

a report concluding that "although some may ignore its existence, gender bias permeates Florida's legal system today."

The members of FAWL have a strong interest in stopping sexual harassment of women in the workplace. Sexual harassment is one of the most widespread problems faced by women in the work force. Its detrimental effect upon the mental and physical health of women workers, as well as their ability to advance in their chosen careers, has been well-documented. The court of appeals' ruling frustrates the ability of employers to protect women from sexual harassment and provides further disincentive for women to report incidents of sexual harassment in the workplace.

NOW Legal Defense and Education Fund ("NOW LDEF") is a leading national non-profit civil rights organization that performs a broad range of legal and educational services in support of women's efforts to eliminate sex-based discrimination and secure equal rights. NOW LDEF was founded in 1970 by leaders of the National Organization for Women. Eliminating sexual harassment in the workplace is a major focus of NOW LDEF's efforts. NOW LDEF attorneys have presented testimony concerning sexual harassment before the Subcommittee on Employment Opportunities of the House Committee on Education and Labor, U.S. Congress, litigated several sexual harassment cases, including *Robinson v. Jacksonville Shipyards, Inc.*, 760 F.Supp. 1486 (M.D. Fla. 1991), *appeal docketed* (11th Cir. July 3, 1991), and coordinated all the amicus briefs filed in *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986). NOW LDEF also drafted an amicus brief on behalf of the employer in *Newsday, Inc. v. Long Island Typographical Union*, 915 F.2d 840 (2d Cir. 1990),

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CCR is of the view that the decision of the Seventh Circuit affirming the decision of the arbitrator to reinstate an employee who has repeatedly engaged in sexual harassment must be reversed. The Seventh Circuit decision is in conflict with similar cases decided by other circuits and violates the well-defined public policy against sexual harassment at the workplace.

REASONS FOR GRANTING PETITION

I.

THE DECISION OF THE SEVENTH CIRCUIT IN THIS CASE UPHOLDING THE REINSTATEMENT OF A CHRONIC SEXUAL HARASSER CONFLICTS WITH DECISIONS OF THE SECOND AND THIRD CIRCUITS THAT AFFORD WOMEN WORKERS GREATER PROTECTION.

The decision of the court of appeals in this case permits an arbitrator to obstruct the well-defined dominant public policy against sexual harassment in the workplace. The decision conflicts with decisions of the courts of appeals in the Second and Third Circuits. The ability of employers to provide a work environment free from discriminatory intimidation, ridicule, and insult hangs in the balance. It is of vital importance to working women, particularly those in non-traditional areas, to be assured that known sexual harassers will not be tolerated in the workplace.

The conflict with *Newsday, Inc. v. Long Island Typographical Union*, 915 F.2d 840 (2d Cir. 1990), *cert. denied*, 111 S.Ct. 1314 (1991) is cogently set forth in petitioner's brief. The Third Circuit has also recently disapproved the reinstatement of a sexual harasser on public policy grounds. In *Stroehmann Bakeries, Inc. v. International Brotherhood of Teamsters*, No. 91-5261 (3d Cir. June 29, 1992), 1992 WL 150962, the arbitrator's reinstatement of an employee discharged for sexual harassment was based on his conclusion that the employer had not sufficiently investigated the alleged incident before discharging the employee. The arbitrator made no determination regarding the merits of the sexual harassment allegation. The Third Circuit held that the arbitrator's award reinstating an employee accused of sexual harassment without a determination regarding the merits of the allegation violates well-established and dominant public policies concerning sexual

harassment in the workplace. In addition to the "dominant public policy against sexual harassment in the workplace," the Third Circuit also noted "a well-defined dominant public policy favoring voluntary employer prevention and application of sanctions against sexual harassment in the workplace," as recognized by this Court in *W.R. Grace & Co. v. Rubber Workers*, 461 U.S. 757, 770 (1983) and *Paperworkers v. Misco, Inc.*, 484 U.S. 29 (1987).[1] 1992 WL 150962, at *6. The Third Circuit concluded:

> [The arbitrator's] award would allow a person who may have committed sexual harassment to continue in the workplace without a determination of whether sexual harassment occurred. Certainly, it does not discourage sexual harassment. Instead, it undermines the employer's ability to fulfill its obligation to prevent and sanction sexual harassment in the workplace. For these reasons, we conclude that reinstatement of this employee without a determination of the merits of the allegation violates public policy.

Id.

The union in *Stroehmann* unsuccessfully presented an argument similar to that successfully relied upon by the union herein, *viz.* that the court cannot vacate a labor arbitration award unless the award itself, not just the means

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[1] Petitioner Chrysler's position in this case is fully consistent with this concern that the public policy against workplace sexual harassment be achieved through "voluntary employer prevention," and the "application of sanctions" that the employer concludes are appropriate in light of all the circumstances. The strong public policy against sexual harassment in the workplace would not *require* dismissal of every sexual harasser. But the Seventh Circuit's decision in this case deprives an employer of its most powerful sanction, dismissal. An employer must be free to determine that dismissal of a sexual harasser is an appropriate way to fulfill its legal duties under Title VII and to protect its women employees.

of arriving at it, violates public policy. The Third Circuit held that the award itself violated public policy because "an award of full reinstatement without findings on what [grievant] did violates the strong public policy" against sexual harassment in the workplace. 1992 WL 150962, at *8. More assuredly, in this case, the reinstatement of Gallenbeck, a known chronic sexual harasser, violates the strong public policy against sexual harassment in the workplace.

Article IX of Chrysler's collective-bargaining agreement with the union provides that Chrysler has the right to discharge for "proper cause." The arbitrator correctly stated that "the degree of discipline imposed must reasonably relate to the seriousness of the employee's proved offense and the record of the employee in his service with the Employer." It is the arbitrator's unsubstantiated denigration of the seriousness of the particular incident at issue in this case that offends the well-defined public policy of this Nation against sexual harassment. The arbitrator conceded that "extremely serious offenses, such as stealing or striking a foreman" justify summary discharge without the necessity of prior warnings or attempts at corrective discipline. The arbitrator opined, however, that "arbitral thought" does not support "the proposition that sexual harassment is such an extremely serious offense that rehabilitation is no longer a concern so that it usually justifies summary discharge without the necessity of prior warnings or attempts at corrective discipline." Pet. App. 61a. This statement is directly at odds with the clear public policy against sexual harassment. The EEOC places particular importance on unwelcome, intentional touching of "intimate body areas" altering the conditions of the working environment. "More so than in the case of verbal advances or remarks, a single unwelcome

physical advance can seriously poison the victim's working environment." *EEOC Policy Guidance on Sexual Harassment*, 8 Fair Emp. Prac. Man. (BNA) 405:6691 (March 19, 1990).

Gallenbeck's actions in this case were not an instance of unreturned love or behavior which might have been appropriate outside the work environment. It does not require some fine balancing of circumstances of place and time and personalities involved to determine the impropriety of Gallenbeck's behavior. Slight nuances of proper workplace etiquette are not involved here. This was an intentional, malicious sexual assault designed to embarrass and humiliate the victim because of her sex.

II.

THE REINSTATEMENT OF A KNOWN AND CHRONIC SEXUAL HARASSER SORELY DENIGRATES WORKING WOMEN AND DETERS THEM FROM REPORTING INCIDENTS OF SEXUAL HARASSMENT.

The impact on women in the workplace of sexual harassers such as Gallenbeck has been documented extensively in recent years. Based on testimony of expert witnesses, the court in *Robinson v. Jacksonville Shipyards, Inc.*, 760 F.Supp. 1486 (M.D. Fla. 1991) found:

> "when sex comes into the workplace women are profoundly affected . . . in their job performance and in their ability to do their jobs without being bothered by it." The effects encompass emotional upset, reduced job satisfaction, the deterrence of women from seeking jobs or promotions, and an increase of women quitting jobs, getting transferred, or being fired because of the sexualization of the workplace.

Id. at 1505 (citations omitted). The court noted that it is established that "victims of sexual harassment suffer

stress effects," and that "stress as a result of sexual harassment is recognized as a specific, diagnosable problem by the American Psychiatric Association." *Id.* at 1506. Relying on a study by the Working Women's Institute finding that "ninety-six percent of sexual harassment victims experienced emotional stress, forty-five percent suffered work performance stress, and thirty-five percent were inflicted with physical stress problems," *id.* at 1507, the court succinctly summarized the devastating effect that reinstating a sexual harasser could be expected to have on working women:

> Sexual harassment has a cumulative, eroding effect on the victim's well-being. When women feel a need to maintain vigilance against the next incident of harassment, the stress is increased tremendously. When women feel that their individual complaints will not change the work environment materially, the ensuing sense of despair further compounds the stress.

Id. at 1507.[2]

Sexual harassment in the workplace has serious psychological, physical and economic consequences. The Working Women's Institute study, referenced in *Robinson*, *supra*, also found that 90% of sexual harassment victims surveyed experienced nervousness, fear and anger and 63% experienced nausea, headaches, and tiredness. Matthew C. Hesse and Lester J. Hubble, Note, *The Dehumanizing Puzzle of Sexual Harassment: A Survey of The Law*

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[2] The court explained that stress effects suffered from sexual harassment include work performance stress, such as "distraction from tasks, dread of work, and an inability to work," emotional stress, covering a range of responses including "anger, fear of physical safety, anxiety, depression, guilt, humiliation, and embarrassment," and "physical stress," which may manifest itself as "sleeping problems, headaches, weight changes, and other physical ailments." *Id.* at 1506.

Concerning Harassment of Women in the Workplace, 24 Washburn L.J. 574, 575 (1985). "All sexual harassment is a stressful experience . . . [T]he victim is violated either physically or psychologically and experiences a loss of autonomy and control." Lin Farley, *Sexual Shakedown* 17 (1979). The common psychological consequences of sexual harassment are "feelings of powerlessness, fear, anger, nervousness, decreased job satisfaction and diminished ambition." *Sexual Discrimination in the Workplace, 1981: Hearings Before Senate Committee on Labor and Human Resources*, 97th Cong., 1st Sess. 524 (1981) (hereinafter *Hearings*) (statement of Karen Sauvigné, Program Director, Working Women's Institute). The effects of sexual harassment frequently include headaches, backaches, nausea, weight loss or gain, insomnia, depression and nervousness. *Hearings, supra*, at 524; *Sexual Harassment in the Federal Government, Hearings before the Subcomm. on Investigations of the House Comm. on Post Office and Civil Service*, 96th Cong., 1st Sess. 28 (1979) (statement of Jan Laventer, Women's Justice Center); Carroll M. Brodsky, *The Harassed Worker* 40 (1976); Jill Laurie Goodman, *Sexual Harassment: Some Observations on the Distance Travelled and the Distance Yet To Go*, 10 Cap. U. L. Rev. 445, 456 (1981).

In *Zabkowicz v. West Bend Co.*, 589 F.Supp. 780 (E.D. Wis. 1984), for example, there was testimony from two treating physicians that the sexual harassment victim in that case was "anxious and subject to crying spells" and suffered "diarrhea, vomiting, severe nausea, and cramping," diagnosed as "psychophysiological gastro-intestinal disease due to harassment at work." *Id.* at 783. The victim in that case had taken two medical leaves of absence as a result of sexual harassment in her workplace, lasting a total of almost two months of a three month period.

Loss of motivation, absenteeism, and diminished productivity are the certain by-products of women's loss of desire and ability to work efficiently in the face of hostile and harassing sexual confrontations in the workplace. The 1986 study conducted by the United States Merit Systems Protection Board estimated that lower job productivity, higher turnover, and increased absenteeism as a result of sexual harassment costs federal government employers more than $130 million annually. Merit Systems Protection Board, *Sexual Harassment in the Federal Government: An Update* 40 (1988) (hereinafter *MSPB Study*). This does not include the costs of litigating sexual harassment claims, nor does it include any figure for the established mental, physical, and frequently economic injury suffered by victims of sexual harassment in the workplace. "Victims pay all the intangible costs inflicted by anger, humiliation, frustration, withdrawal, dysfunction in family life, or other damage that can be sexual harassment's aftermath." *Id.* at 41. Women often quit jobs, request transfers, refuse promotions and training, take paid and unpaid time off, and develop negative attitudes leading to poor job performance, as a result of sexual harassment in the workplace. Wendy Pollack, *Sexual Harassment: Women's Experience vs. Legal Definitions*, 13 Harv. Women's L.J. 46, 51 (1990). "Women may take themselves out of the work force altogether if they cannot be assured of a safe work environment." *Id.*

With one broad sweep the arbitrator in this case has eradicated years of gains in the recognition of sexual harassment as an extremely serious offense. As noted by the Florida Supreme Court in *Byrd v. Richardson-Greenshields Securities*, 552 So.2d 1099 (Fla. 1989):

> There can be no doubt at this point in time that both the state of Florida and the federal government have

> committed themselves strongly to outlawing and eliminating sexual discrimination in the workplace, including the related evil of sexual harassment. The statutes, case law, and administrative regulations uniformly and without exception condemn sexual harassment in the strongest possible terms.

Id. at 1102.

In *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986), this Court noted the EEOC precedent holding that "Title VII affords employees the right to work in an environment free from discriminatory intimidation, ridicule and insult." *Id.* at 65. In *Rogers v. Equal Employment Opportunity Commission*, 454 F.2d 234 (5th Cir. 1971), *cert. denied*, 406 U.S. 957 (1972), the Fifth Circuit acknowledged that some discriminatory working environments may "destroy completely the emotional and psychological stability of minority group workers." *Id.* at 238. Sexual harassment can have that effect. As the Eleventh Circuit has explained:

> Sexual harassment which creates a hostile or offensive environment for members of one sex is every bit the arbitrary barrier to sexual equality at the workplace that racial harassment is to racial equality. Surely, a requirement that a man or woman run a gauntlet of sexual abuse in return for the privilege of being allowed to work and make a living can be as demeaning and disconcerting as the harshest of racial epithets.

Henson v. Dundee, 682 F.2d 897, 902 (11th Cir. 1982).

Even a single workplace sexual assault is a serious matter. But by ignoring the evidence of other incidents of sexual harassment by Gallenbeck, the arbitrator did much greater harm, returning a known and chronic sexual harasser to the workplace. The arbitrator's refusal to consider the additional evidence of sexual harassment, even

in determining the appropriate sanction, is a striking example of violating public policy under the guise of contractual interpretation. The perpetuation of the license given by the Seventh Circuit to an arbitrator to ignore relevant evidence in the public policy inquiry will effectively condone also the continuation of the hostile workplace environment so abhorred by this Court in *Meritor*.

Published studies amply document that what occurred in this case—the reinstatement of a sexual harasser (by a male arbitrator) after a woman made a complaint—is just what women fear, and what leads them not to report sexual harassment in the first place. A United States Merit Systems Protection Board study reported that 85% of all female harassment victims studied did not report sexually offensive behavior on the job to supervisors or other officials. *MSPB Study*, *supra* at 24, fig. 3-1. Many of these women failed to report the harassment because of embarrassment, fear of worsening harassment, and fear that their complaint would be held against them. *Id.* at 28, fig. 3-5. The Florida Gender Bias Study reports that 40% of female attorneys felt they had been sexually harassed at some time by a state-court judge, but only one of them had ever filed a complaint. *Report of the Florida Supreme Court Gender Bias Study Commission*, p. 206 (1990). In *Robinson*, *supra*, the court found, based on the testimony of expert witnesses, that of the five categorized methods women used to cope with sexual harassment in the workplace, formal complaint is the most rarely used because

> the victim of harassment fears an escalation of the problem, retaliation from the harasser, and embarrassment in the process of reporting. *Victims also often fear that nothing will be done* and they will be blamed for the incident. Thus, the absence of reporting of sexual harassment incidents cannot be viewed as an absence of such incidents from the workplace.

760 F.Supp. at 1506 (emphasis added). By permitting Gallenbeck to return to work until the number of reported instances reaches some yet-to-be-determined threshold, the arbitrator effectively allows chronic harassers like Gallenbeck to benefit from the documented tendency of vulnerable women to not report instances of sexual harassment.

The victim of Gallenbeck's harassment, having finally reached her limit and reported an incident, eventually disclosed additional incidents and was supported by other victims of Gallenbeck's sexual harassment in their reports. This salutary result has been undermined by the Seventh Circuit's affirmance of the arbitrator's award. By returning Gallenbeck to the workplace, the women employees' fears of escalation of the harassment, retaliation from the harassment, and further embarrassment were certainly revived and most probably realized.

III.

THE DENIAL OF A FEDERAL COURT FORUM FOR WOMEN TO CHALLENGE EMPLOYMENT DISCRIMINATION RESULTING FROM ARBITRAL REINSTATEMENT OF A SEXUAL HARASSER VIOLATES PUBLIC POLICY.

Also inherent in this case is a violation of a different type of public policy: that against allowing employment discrimination, including sexual harassment, to stand unchallenged.

In this case, the arbitrator substituted his own opinion for the employer's about what level of discipline is appropriate for a proven sexual harasser. Although arbitrators regularly assess and alter discipline levels, in this case such substitution is contrary to public policy. The arbitrator's interference creates a problem of employment discrimination—sexual harassment and the return of the sexual harasser to the workplace—but leaves the victim

of the discrimination with no federal court forum in which to assert her right to freedom from workplace harassment. Where an employer takes prompt, effective action to remedy sexual harassment—as Chrysler did here—no charge of discrimination is likely to be filed. If an arbitrator's award reinstating the sexual harasser is subsequently upheld, the victim of discrimination may then be left without any remedy. The arbitrator cannot be sued under Title VII for the reinstatement and the resulting renewed hostile work environment; the employer will raise its prompt action in dismissing the harasser as a defense to any Title VII suit; and in any event, the statute of limitations for filing a Title VII action will by that time almost certainly have expired. The very real stress and decrease in psychological well-being and employment opportunity suffered by the victims of sexual harassment would thus not be remediable under Title VII. A real wrong would exist against which there is plentiful public policy, but no remedy.

CONCLUSION

We respectfully request that this Court grant Chrysler's petition for writ of certiorari.

Respectfully submitted,

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